Supreme Court, U.S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1386

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

UNITED PARCEL SERVICE, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

BERNARD G. SEGAL
IRVING R. SEGAL
ROBERT L. KENDALL, JR.
JOHN E. MCKEEVER
1719 Packard Building
Philadelphia, Pa. 19102
(215) 988-2000
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS.

	Page
QUESTION PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. Contrary to the Postal Service's Assertions, the Action of the Courts Below Will Not Hamper Legitimate Postal Service Experimentation	6
II. The Statutory Interpretation Issue and Arguments Raised by the Postal Service Were Carefully Considered and Rejected by Both Courts Below, and Are Without Substance	9
CONCLUSION	17

TABLE OF AUTHORITIES.

Cases: Page

American Airlines, Inc. v. CAB, 359 F. 2d 624 (D. C. Cir.), cert. denied, 385 U. S. 843 (1966) 8

Connecticut Comm. Against Pay TV v. FCC, 301 F. 2d 835 (D. C. Cir.), cert. denied, 371 U. S. 816 (1962) 9

Delta Air Lines, Inc. v. CAB, 455 F. 2d 1340 (D. C. Cir. 1971) 8

National Ass'n of Greeting Card Publ. v. United States Postal Service, 569 F. 2d 570 (D. C. Cir. 1976) 11, 12, 15, 16, 17

National Ass'n of Theatre Owners v. FCC, 420 F. 2d 194 (D. C. Cir. 1969), cert. denied, 397 U. S. 922 (1970) .. 9

Network Project v. FCC, 511 F. 2d 786 (D. C. Cir. 1975) .. 8

United States Postal Service v. Associated Third Class Mail Users, 434 U. S. 884 (1977) 11

United Telegraph Workers v. FCC, 436 F. 2d 920 (D. C. Cir. 1970) 8

Statutes:

28 U. S. C. § 1339 4

39 U. S. C.:

§ 101 et seq. 2

§ 403(a) 11, 12, 13

§ 404(a)(6) 11

§ 409 4

§ 3622 .....1, 2, 4, 5, 11, 12, 13, 16

§ 3622(a) 13, 17

§ 3623 .....1, 2, 4, 5, 12, 13, 16

§ 3624(b) 8

§ 3641 .....2, 4, 16

§ 3661 13

Rules and Regulations:

U. S. Sup. Ct. Rule 19(1)(b) 9, 17

Legislative Materials:

S. Rep. No. 912, 91st Cong., 2d Sess. (1970) 14, 15, 16

H. R. Rep. No. 1104, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U. S. Code Cong. & Ad. News 3649 .....14, 15, 16

TABLE OF AUTHORITIES (Continued).

Other: Page

General Increases—Eastern Central Territory, 316 I. C. C. 467 (1962) 8

Parcel Post Proposal, 1978, Postal Rate Commission Docket No. MC78-1 (Dec. 5, 1979) 4

River Terminals Corp. Class & Commodity Rates, 14 M. C. C. 542 (1939) 8

QUESTION PRESENTED FOR REVIEW

May the United States Postal Service offer shippers new and different rates, denominated as experimental or test rates, for parcel delivery service, and institute as a self-styled experiment a new class of parcel delivery service, without prior public notice and submission of the new rates and class of service to the Postal Rate Commission in accordance with the requirements of Sections 3622 and 3623 of the Postal Reorganization Act, 39 U. S. C. §§ 3622, 3623?

STATEMENT OF THE CASE

The question in this case is whether the United States Postal Service, which has a statutory monopoly in its largest class of service (letter mail), may offer a new class of service and drastically reduce its rates for package delivery, where it competes directly with private enterprise firms, without complying with the procedures and safeguards Congress prescribed in Sections 3622, 3623, and 3641 of the Postal Reorganization Act of 1970, as amended, 39 U. S. C. § 101 *et seq.* (the "Act"). The Postal Service, an enterprise with tax-free revenues (including substantial governmental subsidies) of more than $17 billion dollars, seeks to avoid the requirements of the Act on the ground that the new rates and class of service were offered only to certain high-volume shippers as an experiment, even though the Act contains no such exemption from its requirements as to prior public notice and Postal Rate Commission review.

The Postal Service would read into the Act an exemption for such experiments, designed to enhance its competitive position with respect to private enterprise firms, despite the fact that any experimental rates and classes of service offered by other regulated entities—including competitors of the Postal Service such as Respondents—are subject to the jurisdiction of their respective regulatory agencies (see page 8, n. 3, *infra*). Yet, as the district court stated,

> ". . . because in the postal area the entire regulated industry is represented by one managerial unit and also because of the sheer size and economic importance of the Postal Service, the potential economic havoc that the single unit could wreak with an imprudently structured experiment is enormous." Appendix D at 106a, 455 F. Supp. at 878.

Respondents submit that the district court and the court of appeals were correct in following the clear language of the Act and rejecting the Postal Service's claim to special treatment. The relevant facts are as follows.

In October of 1977, the Postal Service began providing, as an "experiment," a new parcel delivery service under contracts with certain selected high-volume shippers. Appendix D at 60a-61a, 455 F. Supp. at 861. The new service (the "Contract Parcel Service") provided for fixed fee rates based on the average weight of the parcels shipped and, unlike the Postal Service's parcel post rates generally in effect, without regard to the distance the parcels were shipped. Appendix D at 61a, 455 F. Supp. at 861.

In order to be selected by the Postal Service to receive the experimental rates and service, a shipper was required to tender a minimum of 50 parcels per mailing and not less than 250 parcels a week. Appendix D at 61a-62a, 455 F. Supp. at 861-62. If the average weight of the shipper's parcels was five pounds or less (based on infrequent, sample weighings), the rate for each parcel was 87¢, regardless of the actual weight of each parcel and regardless of the distance the parcel was carried, so long as the delivery destination of the parcel was not outside the geographic area covered by the Postal Service bulk mail facility serving the shipper.[1] Appendix D at 61a, 455 F. Supp. at 861. In contrast, the Commission-approved parcel post rates in effect at the time of the experiment for parcels weighing five pounds or less were as high as $1.36, depending on the actual weight of the parcel and the distance the parcel was carried. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 861, n. 7. Under the experiment, if

1. A single bulk mail facility serves substantial areas, sometimes more than several states. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 861, n. 7.

the average weight of the shipper's parcels was over five pounds but not greater than twenty pounds, the rate for each parcel was $1.15. Appendix D at 61a, 455 F. Supp. at 861. The Commission-approved rates for twenty pound parcels varied from $1.58 to $2.93. Appendix D at 61a-62a, n. 7, 455 F. Supp. at 878, n. 7.

Thus, as the district court found, the experimental rates were "significantly less" than the corresponding parcel delivery rates which had been approved by the Commission. Appendix D at 61a, 455 F. Supp. at 861.[2]

The Postal Service never publicly announced the implementation of the Contract Parcel Service, nor did it follow the provisions of the Postal Reorganization Act relating to the implementation of new postal rates and classes of service. See 39 U. S. C. §§ 3622, 3623, 3641.

When UPS learned of the implementation of the Contract Parcel Service, it promptly instituted suit under 39 U. S. C. § 409 ("Suits by and against the Postal Service") and 28 U. S. C. § 1339 (actions relating to the postal service) to enjoin further rendition of the new class of service at the new rates. The Honorable Edward R. Becker of the United States District Court for the Eastern District of Pennsylvania entered a permanent injunction on July 19, 1978. See Appendix D, 455 F. Supp. 857. The United States Court of Appeals for the Third Circuit, in an opinion by the Honorable Leonard I. Garth, affirmed the district court's action on August 7, 1979. See Appendix A, 604 F. 2d 1370. The Honorable A. Leon Higginbotham, Jr., filed a dissenting opinion. Appendix A at 29a-50a, 604 F. 2d at 1382-89. On October 9, 1979, a Postal Service petition for rehearing was denied by the full court of appeals, with only Judge Higginbotham dissenting. See Appendix C.

2. On September 8, 1978, the Postal Service filed with the Postal Rate Commission a request for a recommended decision in which the Postal Service proposed, *inter alia*, to "restructure" the Commission-approved rates and conditions of service for parcel post. Many features of the September 8 proposal are strikingly similar to the features of the Contract Parcel Service. On December 5, 1979, the Commission issued its recommended decision rejecting, on the merits, the changes proposed by the Postal Service in Commission Docket No. MC78-1. **Parcel Post Proposal, 1978,** Postal Rate Commission Docket No. MC78-1 (Dec. 5, 1979).

The district court and the court of appeals both held that Sections 3622 and 3623 of the Act apply to every change in "a rate or rates of postage" (39 U. S. C. § 3622) or in the mail classification schedule which is made available to any segment of the public. After an exhaustive examination of the Act, its legislative history, former 39 U. S. C., and judicial authority under other federal regulatory schemes, the district court concluded:

> "When the Postal Service seeks to experiment with the rates postal patrons pay for sending their mail through the postal system, it must first request a recommended decision from the Postal Rate Commission." Appendix D at 115a, 455 F. Supp. at 881.

Similarly, the court of appeals held:

> "Under the Act no distinction is made in favor of experiments or tests which involve changes in rates or mail classification. Rather, the Act is completely unequivocal in requiring *all* changes in *any* rates and *any* mail classification to be processed through and by the Commission." Appendix A at 13a, 604 F. 2d at 1375.

The Postal Service now seeks certiorari.

REASONS FOR DENYING THE WRIT

I.

Contrary to the Postal Service's Assertions, the Action of the Courts Below Will Not Hamper Legitimate Postal Service Experimentation.

The thrust of the Postal Service's Petition is that the action of the district court and of the court of appeals is contrary to the congressional intent to ". . . rid the mail system of inefficiencies attributable to political interference and to a lack of effective, centralized management authority" (Petition, page 12). This argument is based on an attempt to create the impression that the district court and the court of appeals have held that the Postal Service may not engage in any innovation or experimentation whatever in developing new postal services at fair and reasonable rates. The fact is that neither the district court nor the court of appeals has held any such thing.

The courts below have *not* held that the Postal Service may not experiment with new mail processing machinery and equipment, new mail handling methods, or other new procedures in an effort to increase postal efficiency or otherwise improve the day-to-day service, management, and operations of the Postal Service. Such experiments, which are at the heart of the concept of management authority and flexibility, are unaffected by this case.

Similarly, despite the Postal Service's suggestions to the contrary, the courts below have not precluded all Postal Service experimentation prior to public notice and review by the Postal Rate Commission in the area of the development of new classes of service and postal rates. Here too, the Postal Service remains free to conduct, without prior public notice or Commission review, whatever

experiments it wishes, *provided it does not actually offer new rates and classes of service to any members of the public.* Thus, the district court specifically stated:

> ". . . Commission jurisdiction over what we have termed 'marketplace experiments' would not entail such jurisdiction over *all* experiments. The Postal Service would remain free unilaterally to engage in whatever experimentation it saw fit so long as the experiment did not impact upon the actual rate someone paid for his or her postal service. Dummy packages could be mailed to test sorting machines, costs of processing, efficiency of operations, etc. . . . None of these things would raise the spectre of Rate Commission interference with management's institution or conduct of experiments." Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16.

Indeed, in the case of the Contract Parcel Service at issue here, all of the Postal Service's stated objectives could have been achieved without actually providing a new class of service at discount rates to certain selected high-volume shippers. Experiments of the type referred to by the district court would permit the Postal Service to determine the appropriateness of minimum volume, weight, machinability, and other conditions of service, the operational feasibility of rendering the service, the cost of rendering the service, the adequacy of the hypothetical rates, and other similar matters without the need actually to institute new rates and a new class of service for selected shippers.

The Postal Service also remains free to conduct market studies and to survey shippers in order to determine whether there is a market for the hypothesized rates and class of service. See Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16, where the district court noted that

"[m]arket surveys could be taken to determine shipper receptivity to proposed new services." In fact, the Postal Service did make limited use of this widely-used technique in this case when it surveyed "dozens" of shippers for the purpose of selecting "acceptable" test participants. Stipulation of Facts, ¶ 8, reproduced at pages 29-30 of the appendix filed in the court of appeals.

Finally, even were the Postal Service correct that, for some reason which is not apparent, a new rate or class of service could not be adequately evaluated without actually being made available to mailers, the Postal Service may, like other regulated entities,[3] file the proposed marketplace experiment with the agency which oversees its rate and service offerings. Postal Rate Commission review of proposed experimental rates and classes of service need not impose intolerable burdens on the Postal Service. The Commission has ample authority under Section 3624(b) of the Act, 39 U. S. C. § 3624(b), to expedite requests to approve experimental rates or classes of service, if appropriate, by defining the scope and contour of its hearings. And, like other regulatory agencies, the Commission could, in appropriate circumstances, determine that a particular

3. Cases arising under other federal regulatory schemes indicate that regulatory agency jurisdiction over experimental rates and classes of service is universally assumed and recognized. See, *e.g.*, **Network Project v. FCC,** 511 F. 2d 786, at 794 (D. C. Cir. 1975); **Delta Air Lines, Inc. v. CAB,** 455 F. 2d 1340 (D. C. Cir. 1971); **United Telegraph Workers v. FCC,** 436 F. 2d 920 (D. C. Cir. 1970); **American Airlines, Inc. v. CAB,** 359 F. 2d 624, at 633 n. 26 and accompanying text (D. C. Cir.), *cert. denied,* 385 U. S. 843 (1966); **General Increases—Eastern Central Territory,** 316 I. C. C. 467, at 485 (1962); **River Terminals Corp. Class & Commodity Rates,** 14 M. C. C. 542 (1939). Thus, motor carriers such as Respondents which compete with the Postal Service may not serve even one shipper for one day on one trip, even as an experiment, without first obtaining operating rights from the Interstate Commerce Commission, and any such transportation by a motor carrier for compensation may be offered only pursuant to a published tariff filed with the Interstate Commerce Commission. See Appendix D at 106a-107a, 455 F. Supp. at 878.

experimental program could be approved (with proper restrictions) on the basis of a less searching inquiry than is conducted in the case of nonexperimental changes in rates or classes of service. Compare **Connecticut Comm. Against Pay TV v. FCC,** 301 F. 2d 835, 837 (D. C. Cir.), *cert. denied,* 371 U. S. 816 (1962) ("The distinguishing characteristic . . . in this case is the experimental or trial basis upon which the system is to operate . . . .") with **National Ass'n of Theatre Owners v. FCC,** 420 F. 2d 194, 199 (D. C. Cir. 1969), *cert. denied,* 397 U. S. 922 (1970). As the district court noted in this case, the Commission has in the past expedited proceedings initiated by the Postal Service. Appendix D at 110, n. 23, 455 F. Supp. at 879, n. 23.

In short, the alleged dire consequences which are the basis for the Postal Service's Petition have no foundation in fact. Contrary to the impression which the Postal Service seeks to create, the decisions which the Postal Service would have this Court review are carefully limited so as not to restrict the ability of postal officials to manage the day-to-day operations of the Postal Service. Nor will those decisions hamper the development of new classes of mail and rate structures.

The holdings of the courts below certainly do not raise "an important question of federal law which has not been, but should be, settled by this court." U. S. Sup. Ct. Rule 19(1)(b). Accordingly, the instant Petition for a writ of certiorari should be denied.

II.

The Statutory Interpretation Issue and Arguments Raised by the Postal Service Were Carefully Considered and Rejected by Both Courts Below, and Are Without Substance.

The Postal Service does not raise in its Petition any arguments which were not carefully considered and re-

jected by both the district court and the court of appeals. In fact, in its comprehensive opinion, the district court went beyond the contentions made before it by the Postal Service (see, *e.g.*, Appendix D at 69a, n. 14, 455 F. Supp. at 864, n. 14) and examined in great detail the language of the Act, its legislative history, former 39 U. S. C., and judicial authority under other federal regulatory schemes in an effort to find some basis for the Postal Service's argument that new and different rates and classes of service made available to the public on an experimental basis are not subject to Sections 3622 and 3623, despite the absence of any exemption for experimental rates or classes of service in the all-inclusive language of those sections. But, despite its exhaustive search for some justification for the Postal Service's position, the district court concluded that the plain meaning of the Act requires prior public notice and submission to the Postal Rate Commission of *all* new or different postal rates and classes of service.

With respect to the Postal Service's management flexibility argument, the district court stated:

> "We recognize and weigh heavily the congressional goal of greater managerial flexibility, but also recognize another congressional purpose that finds its incarnation in the Postal Rate Commission. The Commission's existence insures that an agency independent of the Postal Service will provide for public notice and hearing . . . ." Appendix D at page 81a, 455 F. Supp at 869.

The district court went on to note that "[t]he very existence and function of the Postal Rate Commission bespeaks a limitation on postal management's freedom." Appendix D at 83a, 455 F. Supp. at 869. After full consideration of the Postal Service's management flexibility argument, the district court concluded:

> "Mere invocation of the need for and purpose of managerial discretion in experimentation, therefore, cannot prevail, for Congress has unmistakably put limits on that discretion." Appendix D at 83a, 455 F. Supp. at 869.

Likewise, the court of appeals recognized that, under Section 403(a) of the Act, the Postal Service has a duty to "plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." See Appendix A at 12a, 604 F. 2d at 1375, quoting 39 U. S. C. § 403(a). But the court of appeals correctly found that this general duty does not authorize the Postal Service to ignore "the specific and plain provisions of the rate and classification sections" of the Act. Appendix A at 24a, 604 F. 2d at 1380.

In arriving at its conclusion, the Court of Appeals for the Third Circuit relied in part on an earlier decision which also dealt with the Commission's jurisdiction under Section 3622 of the Act, in which the Court of Appeals for the District of Columbia Circuit recognized that ". . . a general powers provision like [former] section 404(6) [now section 404(a)(6)] may not ordinarily override a specific provision such as section 3622 . . . ." **National Ass'n of Greeting Card Publ. v. United States Postal Service,** 569 F. 2d 570, at 597 (D. C. Cir. 1976) (hereinafter, **"NAGCP-I"**), quoted by the court of appeals in its decision here at Appendix A, page 25a, 604 F. 2d at 1380.[4] Significantly, in **NAGCP-I** the Court of Appeals for the District of Columbia Circuit held, as did the district court here, that "a plain reading is the proper reading of section 3622." 569 F. 2d 570, at 596. It went on to state:

4. The judgment in another case which was consolidated with **NAGCP-I** for purposes of briefing and argument was vacated on another issue not relevant here. **United States Postal Service v. Associated Third Class Mail Users,** 434 U. S. 884 (1977).

> ". . . any reasonable examination of the purposes of the Act discloses Congress' implicit design that the distinct functions of service provision and rate adjustment be divided between the Postal Service and the Rate Commission. The expertise of the Postal Service supposedly is in management . . . . The Postal Rate Commission, however, was created specifically to oversee the ratemaking process. Its expertise is in the setting of rates . . . , and its authority therefore reasonably extends to all aspects of such decisions . . . ." 569 F. 2d at 597.

The district court here, relying in part on **NAGCP-I** as well as on its own analysis of the Act, also concluded:

> "The elaborate divisions of responsibility between Congress and the Post Office that had evolved over decades of congressional regulation gave way in the Postal Reorganization Act to a more predictable and principled division of responsibility. Management was vested in the Postal Service, rate and classification supervision in the Postal Rate Commission." Appendix D at 81a, 455 F. Supp. at 868-69.

The Postal Service's management flexibility argument is clearly undermined by the language of Section 403(a) itself. In addition to providing that the Postal Service shall "plan" and "develop" efficient postal services at reasonable rates, Section 403(a) also requires the Postal Service to "*provide* adequate and efficient postal services at fair and reasonable rates" (emphasis added). Clearly, the Section 403(a) duty to "provide" postal services at fair and reasonable rates is subject to the jurisdiction of the Commission under Sections 3622 and 3623. Otherwise, the comprehensive ratemaking and classification program spelled out in the Act would be meaningless. Yet the Postal Service furnishes no reason to explain why the duty

to provide postal services is clearly subject to the requirements of Sections 3622 and 3623, whereas the duty to plan and develop postal services imposed in the very same sentence is said to be exempt from those same requirements by virtue of the language of Section 403(a).

Significantly, where Congress intended to limit the Commission's jurisdiction, it did so explicitly. Thus, Section 3661 of the Act expressly limits the Commission's role as to a "change in the nature of postal services" to changes which "will generally affect service on a nationwide or substantially nationwide basis." 39 U. S. C. § 3661. In contrast, Section 3622 requires the Postal Service to request a Commission decision on changes in "*a rate* or rates of postage." 39 U. S. C. § 3622(a) (emphasis added). The use of the phrase "a rate" together with the plural "rates" demonstrates that Congress intended the Commission's Section 3622 jurisdiction to apply even if only one rate is to be changed.

Section 3661 shows that Congress knew how to limit the Commission's jurisdiction over changes in rates and classes of service had it chosen to do so. Its failure to use similar limiting language in Sections 3622 and 3623 confirms the all-inclusive nature of the Commission's jurisdiction under those sections.

The Postal Service suggests that the legislative history of the Act provides support for the proposition that the all-inclusive language of Sections 3622 and 3623 of the Act should, in effect, be rewritten by the courts so as not to apply to new or different rates and classes of service offered to the public as part of an experiment designed solely by the Postal Service. The only statement cited by the Postal Service in support of its position—other than general expressions concerning the desirability of giving postal management ". . . the unfettered authority and freedom . . . to *maintain and operate* an efficient service,"

S. Rep. No. 912, 91st Cong., 2d Sess. at page 2 (1970) (emphasis added), quoted at Petition, page 12—is a statement taken out of context from the report of the House Committee on Post Office and Civil Service on an earlier version of the bill to the effect that "[t]he Postal Service is empowered to engage in research and development programs directed toward the expansion of present postal service and the development of new services responsive to the evolving needs of the United States." H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 9 (1970), *reprinted in* 1970 U. S. Code Cong. & Ad. News 3639, at 3657. But that statement does not support the position of the Postal Service here. As we have pointed out (pages 6-9 *supra*), the decisions of the courts below do not prevent the Postal Service from engaging in research and development efforts looking toward the development of new postal services. Instead, the court of appeals specifically stated:

> "We do not here hold that all 'test plans' must be submitted to the Rate Commission (see *e.g.* Part III B, *supra* . . .). We do hold, however, that any proposal which would effect a change in mail classification or a rate, including a test or experiment embodying those features, must be submitted to the Rate Commission, no matter how experimental, temporary, or limited in scope the change." Appendix A at 26a, 604 F. 2d at 1380.

See also the opinion of the district court, Appendix D at 87a, n. 16, 455 F. Supp. at 871, n. 16, quoted at page 7, *supra*. As the district court held,

> ". . . where the 'experiment' does not consist of mock packages mailed at hypothetical rates but instead requires the payment of real postage by real shippers for real parcel post service, there have been changes, however limited, in rates of postage and classifications of mail that affect these shippers and that fall within a 'plain meaning' reading of the statutory language." Appendix D at 68a, 455 F. Supp. at 864.

Contrary to the Postal Service's unsupported contention, the legislative history of the Act confirms that *all* postal rates and classifications, no matter how limited in extent and applicability, are subject to prior public notice and submission to the Commission before they may be offered to any segment of the public. See, *e.g.*, H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 42 (1970), 1970 U. S. Code Cong. & Ad. News at 3693 (stating that the Postal Service would be subject to ". . . the general requirement of 30 days' advance public notice of *all* changes in rates, classification, or the rate structure and of filing such proposed changes with the Rate [Commission]") (emphasis added); S. Rep. No. 912, 91st Cong., 2d Sess. at page 14 (1970), where the Senate Committee stated (emphasis added):

> "In discharging the highly important responsibilities vested in the Commission, it must exercise its best judgment to insure that *all* postal rates, fees, and classifications are reasonable and equitable, and to insure that the rights of *all* mail users are protected . . . ."

Finally, the Postal Service suggests (in a footnote) that it retains the powers which were exercised by the Postmaster General of the then Post Office Department before the Act was passed in 1970. This contention was carefully considered and rejected by the district court. Appendix D at 77a-86a, 455 F. Supp. at 867-70. It had previously been rejected by the Court of Appeals for the District of Columbia Circuit in **NAGCP-I**, page 11, *supra*,

where the Postal Service argued that it was not required to submit changes in fees for special postal services to the Commission because, under prior law, the Postmaster General of the then Post Office Department had sole authority to set such fees. See **NAGCP-I**, *supra*, 569 F. 2d at 597.

It is clear that the Act represented "a complete break with the past." S. Rep. No. 912, 91st Cong., 2d Sess. at page 2 (1970). See also, *e.g.*, H. R. Rep. No. 1104, 91st Cong., 2d Sess. at page 6 (1970), 1970 U. S. Code Cong. & Ad. News at 3654. Thus, the **NAGCP-I** court noted "the fundamental change Congress intended in creating the Postal Rate Commission." 569 F. 2d at 597. Indeed, the very purpose of the Act was to restructure completely the manner by which postal rates and classes of service are determined. Clearly, the fact that Congress desired to permit the Postal Service to manage its own business does not remove the Postal Service in any way from regulatory requirements with respect to rates and classes of service established in the same Act.

The Postal Service did not make this argument based on former law before the court of appeals. Nevertheless, it now invokes it before this Court in an effort to obtain certiorari.[5] The Postal Service's belated attempt to resurrect that argument in this Court should be rejected, and its Petition should be denied.

5. The Postal Service also finds it difficult not to argue before this Court that the title of subchapter II of chapter 36 of the Act—"*Permanent* Rates and Classes of Mail" (emphasis added)—demonstrates that Sections 3622 and 3623 do not cover experimental rates and classes of service (see Petition, pages 4, 8-9, n. 3, 15), although it expressly declined to make that argument before the district court. See Appendix D at 102a-103a, n. 21, 455 F. Supp. at 876-77, n. 21. In any event, the district court adequately disposed of any argument based on the use of the term "Permanent" in the subchapter heading. *Id.* Clearly, Congress used the term to distinguish Commission approved rates and classes under Sections 3622 and 3623 from the unreviewed "Temporary Rates and Classes" provided for by subchapter III of chapter 36, 39 U. S. C. § 3641.

CONCLUSION

The holdings of the district court and of the court of appeals do not affect in any way the day-to-day management authority and flexibility of the Postal Service. Nor do they prevent the Postal Service from conducting extensive research and development programs in numerous fields, including programs designed to evaluate new classes of postal service and associated rates. All that the court of appeals and the district court have held is that Section 3622(a) of the Act means what it says when it requires the Postal Service to request the Postal Rate Commission to review "changes in *a rate* or rates of postage or in *a fee* or fees for postal services." 39 U. S. C. § 3622(a) (emphasis added).

The Postal Service concedes that the holding below does not conflict with a decision of any other court of appeals (Petition, page 20). In fact, the decision below is consistent with the approach of the Court of Appeals for the District of Columbia Circuit in the **NAGCP-I** case. Thus, the decisions of the two courts of appeals which have considered the ratemaking and classification provisions of the Postal Reorganization Act are completely consistent, and clearly are not in conflict with each other in any way. See U. S. Sup. Ct. Rule 19(1)(b).

WHEREFORE, Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

BERNARD G. SEGAL
IRVING R. SEGAL
ROBERT L. KENDALL, JR.
JOHN E. MCKEEVER
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2000
Of Counsel.

Dated: April 23, 1980